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92-82

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1992

UNITED STATES OF AMERICA,

Respondent,

-against-

BENEDETTO ROMANO,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the United States District Court has jurisdiction pursuant to Section 7402(a) of the Internal Revenue Code and 28 U.S. Code Sections 1340 and 1345 to reduce termination tax assessments (6851, I.R.C.) to judgment subject to modification pursuant to Section 7403 of the I.R.C. (26 U.S.C.) subsequent to petition filed in United States Tax Court when 26 U.S.C. Section 7422(e) mandates that once a petition is filed in Tax Court, "The district court and the court of claims as the case may be should lose jurisdiction."

LIST OF PARTIES

BENEDETTO ROMANO, defendant in the United States District Court appealed to the Second Circuit Court of Appeals.

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IN THE
Supreme Court of the United States
October Term, 1992

UNITED STATES OF AMERICA,

Respondent,

-against-

BENEDETTO ROMANO,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, BENEDETTO ROMANO prays that a writ of certiorari issue to review a final judgment and order of the United States Court of Appeals for the Second Circuit decided April 8, 1992 and amended May 6, 1992 (Appendix A) infra which affirmed the judgment of the United States District Court for the Eastern District of New York (Korman, Edward R.D.J.) granting summary judgment to the respondent.

THE OPINION OF THE COURT BELOW

The opinions of the Court below, namely the United States Court of Appeals for the Second Circuit affirming the decision and judgment are set forth in Appendix A, infra as aforesaid.

JURISDICTION

The orders of the judgment of the United States Court of Appeals for the Second Circuit, the Court below are dated April 8 and May 6, 1992. Jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. § 1254(1).

THE PRINCIPAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Internal Revenue Code Sections 6851, 6861, 6863/7422 and 7429

STATEMENT OF THE CASE

The facts are not in dispute. Solely due to Federal Custom Agents seizing $359,500 in cash BENEDETTO ROMANO was carrying in his automobile when he attempted to enter Canada from Buffalo, New York, the Internal Revenue Service made a deficiency determination pursuant to Code Section 6851(a), which provided for termination of the tax year and immediate determination of the tax due. Following the procedures mandated by Congress and the Supreme Court decision in Laing, 423 U.S. 161 (1976) a 90 day letter was subsequently issued and a petition was timely filed in the United States Tax Court, Docket No. 621-85 still pending.

REASON FOR GRANTING THE PETITION

1. The lower Court's decision is ill conceived, controverts Congressional intent and is contrary to Supreme Court precedent.

2. Conflict in the Court exist and this decision renders jurisdiction of the United States Tax Court a nullity upon the whims of the United States.

WHETHER JURISDICTION OF THE UNITED STATES TAX COURT MAY BE SUBJECTED TO WHIMS OF THE UNITED STATES GOVERNMENT AND UNITED STATES DISTRICT COURT IN CONTRAVENTION OF THE INTERNAL REVENUE CODE AND LIMITATIONS PLACED ON UNITED STATES DISTRICT COURT JURISDICTION PURSUANT TO CODE SECTION 6851, 6512, PLUS 7422 AND CONGRESSIONAL TEACHINGS

The Supreme Court in *Laing, 96 S. CT. 473, 423 U.S. 161*, set the foundation for the procedures involved with regard to a termination and jeopardy assessment and triggered Congressional action. The tax owing but not reported, at a time of a jeopardy termination of a tax year under Code Section 6851 is a deficiency, whose assessment and collection is subject to the procedural requirements of Code Section 6861. As a result the Internal Revenue Service must mail a deficiency notice to the taxpayer within 60 days after the jeopardy assessment.

Termination assessments are made when it appears to the Internal Revenue Service that the collection of income tax for the current tax year or the immediate preceding year will be jeopardized by certain acts of a taxpayer. Regs. 1.6851-1(a)(1).

If the District Director decides that a termination assessment for a current year is to be made, the taxpayer is assessed an income tax liability that is based on the taxpayer's taxable income for a period that begins on the 1st

day of the tax year and ends on the day of assessment. A termination assessment thus does not end the taxable year for any purpose other than the computation of tax that becomes due and payable by reason of the termination assessment. The termination assessment of tax, thus, has an effect similar to the collection of estimated taxes. Code Section 6851 (a)(1)(2) and (3).

Prior to the Tax Reform Act of 1976, there was no immediate avenue for judicial review of these extraordinary assessments. The taxpayer was relegated to the post collection remedy of a suit for a tax refund. The 1976 act, however provided for both administrative and judicial review of this type of assessment. 26 U.S.C. §7429.

The District Court's task under §7429 is limited to evaluating the reasonableness of the Internal Revenue Service assessment. The taxpayer's ultimate tax liability is not at issue.

The holding below is inconsistent with this court's decision in *Laing*, supra, and conflicts with decisions of other Federal Courts. Court decisions have been consistent with basis that once United States Tax Court has jurisdiction, transfer to another Court can possibly be based solely on consent of both parties examining Congressional intent as inferred through the applicable statutes.

The judiciary has a role as a neutral "checkpoint between the government and the citizen." But once in United States Tax Court, the United States District Court has no authority to overrule the former's jurisdiction. This is an infringement of the United States Tax Court's jurisdiction and responsibilities.

This Court held in *Laing*, supra, that within 60 days after a termination assessment, the Service should have sent deficiency notices to the petitioner despite the absence of an explicit requirement to that effect in the termination assessment statute. In so ruling the Court was particularly concerned that individuals subjected to the extraordinary remedy of termination assessment be afforded the opportunity to obtain a redetermination of the deficiency in the Tax Court. The Court noted:

> Denial of an opportunity to litigate in the Tax Court is out of keeping with the thrust of the Code, which generally allows income-tax payers access to that Court. Where exceptions are intended, the Code is explicit on the matter. See e.g. § 6871 (b). Denying a Tax Court forum to a particular class of taxpayers is sufficiently anomalous that an intention to do so should not be imputed to Congress when the statute does not expressly so provide.

Laing v U.S., supra, 423 U.S. at 176.

After Laing, Congress amended the termination provision, adding section 6851 (b), which requires that deficiency notices be sent to taxpayers who have been subjected to termination assessments. However, Congress did not adopt the 60 day rule articulated in *Laing*. Instead it provided that the Service could wait until the terminated year actually ended. Then, the Service would be required to send the taxpayer a deficiency notice within 60 days after the later of the due date of the tax return or the actual filing date of the return as noted. This framework does enable the taxpayer to challenge the termination assessment in the Tax Court, but requires the taxpayer to wait until the terminated year has come to a natural close.

Even though Congress chose a procedure for sending notices of deficiency that differs slightly from the procedure articulated in *Laing*, it is clear that in adding the deficiency notice provision to the termination assessment statute, Congress was motivated by the same concerns which had prompted the Supreme Court to import the jeopardy termination safeguards into the termination assessment context. Congress was trying to assure that redetermination in the Tax Court would ultimately be avaliable to the taxpayer subjected to termination assessment. As was noted in the General Explanation of the Tax Reform Act of 1976 by the Staff of the Joint Committee on Taxation

> Congress believes it appropriate to allow a taxpayer who has been subjected to a termination assessment to contest the ultimate issue of his tax liability in the Tax Court in the same manner as is provided with respect to a taxpayer who has been subjected to a jeopardy assessment. Consequently, the Act provides that within 60 days after the later of the due date of the taxpayer's return for the full taxable year or the date on which the return is actually filed, the Service must send the taxpayer a notice of deficiency.

H.R. No. 10612, 94th Cong, 2d Sess. 363(1976)

> Congress chose not to use the 60 day rule set forth in Laing because in addition to providing year-end access to the Tax Court for taxpayers subjected to termination assessment, Congress also amended the Internal Revenue Code to provide an expedited mid-year administrative and judicial review. Congress determined that this review would constitute an adequate mid-year procedural safeguard, while eliminating the technical difficulties involved in a full

mid-year redetermination by the Tax Court. See H.R. Rep. No. 10612, 94th Cong, 2d Sess. 363 (1976)

Thus pursuant to 26 U.S.C. § 7429, within 30 days of receipt from the Service of a written statement of the information on which it relied in making its termination assessment a taxpayer may now request the Service to review the assessment. The Service determines whether the termination assessment was reasonable under the circumstances and whether the amount demanded was appropriate. The Service notifies the taxpayer of its decision. The taxpayer may then bring a civil action in district court. The district court's review, like that of the Service, is limited to a determination whether the assessment was reasonable under the circumstances and whether the amount demanded was appropriate.

Petitioner did not take advantage of these expedited mid-year review procedures, although he could have done so without a notice of deficiency. Evidently, his failure to take advantage of these optional remedies does not affect his right to receive a notice of deficiency and file a petition for redetermination in the Tax Court. The mid-year proceedings would have resulted in only a determination as to the "reasonableness" and "appropriatencee" of the assessment. This would not have given him the full relief he would be entitled to in the Tax Court- a redetermination of the amount of the deficiency. In discussing the mid-year review mechanisms, Congress acknowledged that they were not intended to serve as a substitute for a full determination in the Tax Court.

In determining whether the amount assessed is appropriate under the circumstances, the Court is not

> expected to attempt to determine ultimate tax liability. Rather, the issue to be determined is whether, based on the information then available, the amount of the assessment is reasonable. Thus, for example, in the absence of other evidence made available to the Internal Revenue before the proceeding or during the proceeding, an assessment of an estimate of the taxpayer's liability to date based on information in fact available to the Internal Revenue Service will be presumed to be reasonable.
>
> A determination made under section 7429 will have no effect upon the determination of the correct tax liability in a subsequent proceeding. The proceeding under the new provision is to be a separate proceeding which is unrelated, substantively and procedurally, to any subsequent proceeding to determine the correct tax liability, either by action for refund in a Federal district court or in the Court of Claims or by a proceeding in the Tax Court. H.R. Rep. No. 10612, 94th Cong., 2d Sess 362(1976)

See/cf. Perlowin v. Michael D. Sassi, (D.C. Calif) 83-1 U.S.T.C. 9417 and C.A.-9 1983, 711 F.2d. 910.

As was pointedly revealed in U.S.A. v. LeRoy Doyle, (DC-ED Wisc) 494 F. Supp. 1041

> The summary proceeding under § 7429 is to be a separate proceeding which is unrelated substantively and procedurally to any subsequent proceeding to determine the correct tax liability either by action for refund in a Federal taxpayer's District Court or in the Court of Claims or by a proceeding in the Tax Court. S. Rep. No. 94-938 (part I), 94th Cong,2d Sess 365 reprinted in (1976) U.S. Code & Adm. News 3429, 3795.

The District Court has no jurisdiction to hear a case when a petition has been filed in Tax Court. Baker v. U.S., DC-D of C, 518 F.Supp. 45. citing Dorl v. Comm, 507 F.2d 406 (2d Cir, 1974) citing U.S. v. Wolf, 238 F.2d 447,449 (9th Cir 1956) and Elbert v. Johnson, 164 F.2d 421,424 (2d Cir. 1947). See also U.S. v. Joe Graham Post No. 119 Am. Legion, 340 F.2d 474 (5th Cir 1965) cert. den. 382 U.S. 824. Yannicelli v. Nash, 354 F. Supp. 143 (N.J. 1973).

Thus it is a remarkable conclusion by the Second Circuit with regard to a case having to do with a foreclosure of a tax lien, U.S. v. Stonehill, 702 F.2d 1288, 1292 (9th Cir 1983) that it had jurisdiction. Had Congress intended for the District Court to have jurisdiction solely based on Termination Assessment it would have done so expressly without requiring a notice of deficiency within 60 days.

The government subsequent to the decision rendered by the Second Circuit Court of Appeals on April 8, 1992 made a motion to correct the opinion specifically objecting to the Court's stating "Since any final judgment obtained in this case is subject to a refund if the Tax Court determines there has been an overassessment, the District Court did not have to decline jurisdiction, Clinton, 232 F. Supp. at 958 and we find no abuse of discretion."

Moreover, taking exception to "the proceeding in the Tax Court is still pending, so the final assessment has not yet been determined."

It was then requested that in contravention of Code Sction 7429, Congressional intent and this Court's decision in *Laing*, supra, that the Court "correct its opinion to reflect that the termination assessment made against the taxpayer has been determined on the merits and that taxpayer may not relitigate his liability for these taxes in his

Tax Court proceeding pointedly revealing that "a suit to reduce an assessment to judgment is a proceeding on the merits of the tax assessment; it determines the taxpayer's tax liability and is res judicata in any future proceedings." This determination based on Laing and Congressional intent should be in the United States Tax Court.

STARE DECISIS

The overruling of Congressional intent and Court precedents ought to be a matter of great moment and consequence. Although the doctrine of stare decisis is not an "inexorable command", *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 395, 405 (1932) (Brandeis J. dissenting), the Supreme Court has repeatedly stressed that fidelity to precedent is fundamental to a "society governed by the rule of law". *Akron v. Akron Center for Reproductive Healty, Inc.*, 462 U.S. 416,420 (1983). See generally *Patterson v. McLean Credit Union*, 491 U.S. 164,172(1989). It is indisputable that stare decisis is a basic self governing principle within the judicial branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprecedential system that is not based upon an arbitrary discretion.

The Second Circuit cannot seriously claim that any legal basis exists for removing jurisdiction from the Tax Court which this decision accomplishes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

BENEDETTO ROMANO,

Defendant.

CV-89-3862 (ERK)

ORDER

The plaintiff United States of America, having moved this Court for entry of summary judgment in its favor and upon a review of all the papers submitted in this manner and oral argument having been had thereon it is hereby

ORDERED AND ADJUDGED that the plaintiff's motion for summary judgment is granted and it is further

ORDERED AND ADJUDGED that summary judgment is entered in favor of the United States in the amount of $169,981.00 plus statutory interest as allowed by law.

HONORABEL EDWARD R. KORMAN
United States District Judge

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of April, one thousand nine hundred and ninety-two.

PRESENT:

HON. ROGER J. MINER,
Circuit Judge,
HON. JOHN S. MARTIN, Jr.,
District Judge.[1]

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BENEDETTO ROMANO,

Defendant-Appellant.

ORDER
91-6106

UPON CONSIDERATION of this appeal from an order entered by the United District Court for the Eastern District of New York (Korman, J.) it is hereby

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[1] Hon. John S. Martin, Jr., United States District Judge for the Southern DIstrict of New York, sitting by disignation.

ORDERED, ADJUDGED, AND DECREED that the judgment of the said District Court be and it hereby is affirmed.

Defendant-appellant Benedetto Romano appeals from an order entered in the District Court on December 19, 1990, granting in the amount of $169,981 "plus statutory interest as allowed by law" for taxes owed pursuant to a termination assessment issued by the Internal Revenue Service ("IRS"), 26 U.S.C. § 6851, for tax year 1983.

In Novemer 1983, Romano and his wife attempted to cross into Canada via the Peace Bridge near Buffalo, New York. A Canadian customs agent stopped their car on the Canadian side and requested permission to search the trunk. Romano agreed, and the agent discovered several bags containing U.S. currency inside. The agent then contacted the U.S. Customs Service on the other side of the bridge. The U.S. agents requested that the Romanos be returned to the United States, and the Canadian agent sent them back across the bridge.

On the American side, U.S. Customs agents questioned Romano, who eventually admitted that the bags contained over $300,000 in cash. Romano filled out the appropriate forms to declare this amount, and the agents seized the money ($359,500) pursuant to 31 U.S.C. § 5317(c) (money may be seized for failure to report its transportation outside the United States). The IRS was informed of the seizure, and, based on the cash in Romano's possession at the time, issued a termination assessment, 26 U.S.C. § 6851, against Romano for $169,981 as income tax due. The termination assessment abruptly ended Romano's tax year and determined his tax liability for that tax year, because he was presumed to be attempting to hide the cash from the government's reach. *Id.* The

amount of a tax liability set by a termination assessment is due immediately. *Id.*

In October 1984, after Romano failed to file a tax return for tax year 1983 (including extensions), the IRS sent him a notice of deficiency for that year, which included the amount calculated under the termination assessment. *Id.* at §§ 6212, 6851(b). Romano timely appealed the assessed deficiency to the Tax Court. *Id.* at §6213(a). In a subsequent civil proceeding seeking forfeiture of the cash pursuant to 31 U.S.C. §5317(b), the government sought the entire $359,500 discovered at the border. The district court denied the forfeiture, holding that actual knowledge of the reporting requirement by the defendant was necessary to sustain forfeiture under 31 U.S.C. §5317. *United States v. $359,500 in United States Currency,* 645 F. Supp. 638 (W.D.N.Y. 1986), *rev'd,* 828 F.2d 930 (2d Cir. 1987).

We reversed, ruling that constructive knowledge is sufficient to support a forfeiture, and remanded for a determination of Romano's constructive knowledge of the reporting requirement. *United States v. $359,500 in United States Currency,* 828 F.2d 930 (2d Cir. 1987). The district court stayed the action when Romano invoked his Fifth Amendment right against self-incrimination, based upon a pending criminal tax evasion indictment, when he was asked questions about his constructive knowledge of the requirement. In the criminal case, Romano was charged with, and convicted of, one count of tax evasion. We overturned the conviction, *United States v. Romano,* 938 F.2d 1569 (2d Cir. 1991), finding that the government failed to prove that Romano affirmatively attempted to evade taxes.

In the meantime, the government, in November 1989, filed this suit on behalf of the IRS to reduce the deficiency for tax year 1983 (specifically the amount in the termination assessment) to judgment. The proceeding in the Tax court is still pending, so the final assessment has not yet been determined. Romano argues on appeal that the District Court lacked subject matter jurisdiction because of the pending Tax Court proceeding. This argument fails.

The Tax Court and the district courts have concurrent jurisdiction to determine a taxpayer's final deficiency. *See* 26 U.S.C. §§ 6213(a), 7402(a); *see also* 28 U.S.C. § 1340. If he taxpayer timely petitions the Tax Court, the government is prohibited from, among other things, commencing any proceedings for collection of the deficiency until the Tax Court decision becomes final. 26 U.S.C. § 6213(a). Excluded from this prohibition, however, are proceedings brought by the government to enforce termination assessments under section 6851. Thus, section 6213 specifically permits the government to bring actions such as this one. *See United States v. Cinton*, 232 F. Supp. 957, 958 (S.D.N.Y. 1964).

The only method by which a taxpayer may stay collection of the tax due on a termination assessment is by filing "a bond in an amount equal to the amount as to which the stay is desired." 26 U.S.C. § 6863; *see United States v. O'Commor*, 291 F.2d 520, 525 (2d Cir. 1961); *Clinton*, 232 F. Supp. at 958. Unless the taxpayer files the bond, the IRS may seek to collect the assessed amount by bringing a proceeding in a district court, even during pendency of a Tax Court action. *See Clinton*, 232 F. Supp. at 958. In this case, Romano failed to file a bond. Thus, since the statute expressly permits the government to bring this action, and the District Court has jurisdiction to hear such cases, the

only issue remaining is whether the District Court should have exercised jurisdiction under these circumstances or deferred to the Tax Court proceeding. *O'Commor*, 291 F.2d at 528. Since any final judgment obtained in this case is subject to a refund if the Tax Court determines that there has been an overassessment, the District Court did not have to decline jurisdiction, *Clinton*, 232 F. Supp. at 958, and we find no abuse of discretion.

In his conclusory opposition to summary judgment, Romano did not ask the District Court to stay the concurrent Tax Court proceeding. Furthermore, Romano offered no opposition to the merits of the termination assessment in response to the motion. Without a reason from Romano to stay its hand, and in the absence of a showing of any triable issue of fact regarding the termination assessment itself, the District Court did not abuse its discretion in granting summary judgment based on the government's submission.

Finally, Romano in his brief makes the following contention: "Suppression is mandated by the Fifth Amendment Due Process Constitution violation and the suppression remedy is contained within the guarantee of the Fifth Amendment itself." This sentence constitutes the sum total of Romano's argument on this point. Federal Rule of Appellate Procedure 28(a)(5) states that an appellant's brief shall contain an argument setting forth the "contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." Failure to develop an argument with some support in fact and law results in waiver of the argument. *See, e.g., United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.), *cert. denied*, 494 U.S. 1082 (1990); *Hershinow v. Bonamarte*, 735 F.2d 264,

266 (7th Cir. 1984); *Carducci v. Regan*, 174 F.2d 171, 177 (D.C. Cir. 1983). As Romano does nothing more than make an unsupported allegation on this issue, the argument is waived, and we need not address it.

We have considered appellant's remaining arguments and find them to be without merit.

HON. ROGER J. MINER,
Circuit Judge,

HON. JOHN S. MARTIN, Jr.,
District Judge.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

AMENDED ORDER

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of May, one thousand nine hundred and ninety-two.

PRESENT:

HON. ROGER J. MINER,
Circuit Judge,
HON. JOHN S. MARTIN, Jr.,
District Judge.[1]

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

ORDER
91-6106

v.

BENEDETTO ROMANO,

Defendant-Appellant.

---

[1] Hon. John S. Martin, Jr., United States District Judge for the Southern District of New York, sitting by designation.

UPON CONSIDERATION of this appeal from an order entered by the United States District Court for the Eastern District of New York (Korman, J.) it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment of the said District Court be and it hereby is affirmed.

Defendant-appellant Benedetto Romano appeals from an order entered in the District Court on December 19, 1990, granting summary judgment in favor of plaintiff-appellee the United States in the amount of $169,981 "plus statutory interest as allowed by law" for taxes owed pursuant to a termination assessment issued by the Internal Revenue Service ("IRS"), 26 U.S.C. § 6851, for tax year 1983.

Romano agreed, and the agent discovered several bags containing U.S. currency inside. The agent then contacted the U.S. Customs Service on the other side of the bridge. The U.S. agents requested that the Romanos be returned to the United States, and the Canadian agent sent them back across the bridge.

On the American side, U.S. Customs agents questioned Romano, who eventually admitted that the bags contained over $300,000 in cash. Romano filled out the appropriate forms to declare this amount, and the agents seized the money ($359,500) pursuant to 31 U.S.C. § 5317(c) (money may be seized for failure to report its transportation outside the United States). The IRS was informed of the seizure, and, based on the cash in Romano's possession at the time, issued a termination assessment, 26 U.S.C. § 6851, against Romano for $169,981 as income tax due. The termination assessment abruptly ended Romano's tax year and determined his tax liability for that

tax year, because he was presumed to be attempting to hide the cash from the government's reach. *Id.* The amount of a tax liability set by a termination assessment is due imediately. *Id.*

In October 1984, after Romano failed to file a tax return for tax year 1983 (including extensions), the IRS sent him a notice of deficiency for that year, which included the amount calculated under the termination assessment. *Id.* at §§ 6212, 6851(b). Romano timely appealed the assessed deficiency to the Tax Court. *Id.* at § 6213(a). In a subsequent civil proceeding seeking forfeiture of the cash pursuant to 31 U.S.C. § 5317(b), the government sought the entire $359,500 discovered at the border. The district court denied the forfeiture, holding that actual knowledge of the reporting requirement by the defendant was necessary to sustain forfeiture under 31 U.S.C. § 5317. *United States v. $359,500 in United States Currency*, 645 F. Supp. 638 (W.D.N.Y. 1986), *rev'd*, 828 F.2d 930 (2d Cir. 1987).

We reversed, ruling that constructive knowledge is sufficient to support a forfeiture, and remanded for a determination of Romano's constructive knowledge of the reporting requirement. *United States v. $359,500 in United States Currency*, 828 F.2d 930 (2d Cir. 1987). The district court stayed the action when Romano invoked his Fifth Amendment right against self-incrimination, based upon a pending criminal tax evasion indictment, when he was asked questions about his constructive knowledge of the requirement. In the criminal case, Romano was charged with, and convicted of, one count of tax evasion. We overturned the conviction, *United States v. Romano*, 938 F.2d 1569 (2d Cir. 1991), finding that the government failed to prove that Romano affirmatively attempted to evade taxes.

In the meantime, the government, in November 1989, filed this suit on behalf of the IRS to reduce the amount in the termination assessment to judgment. The proceeding in the Tax Court is still pending, so the final assessment for tax year 1983 has not yet been determined. Romano argues on appeal that the District Court lacked subject matter jurisdiction because of the pending Tax Court proceeding. This argument fails.

The Tax Court and the district courts have concurrent jurisdiction to determine a taxpayer's income tax liability. *See* 26 U.S.C. § 7402(a); *see also* 28 U.S.C. § 1340. Section 7402 provides a broad grant of jurisdiction to district courts "to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws." The government may initiate thereunder an action in a district court to reduce a termination assessment to judgment. *Cf. United States v. Stonehill*, 702 F.2d 1288, 1292 (9th Cir. 1983) (action jeopardy assessments). Ordinarily, if the taxpayer timely petitions the Tax Court, the government is prohibited from, among other things, commencing any proceedings for collection of the deficiency assessed until the Tax Court decision becomes final. 26 U.S.C. § 6213(a). Excluded from this prohibition, however, are proceedings brought by the government to enforce termination assessments made under section 6851. Thus, section 6213 does not bar the government from bringing actions such as this one. *See United States v. Clinton*, 232 F. Supp. 957, 958 (S.D.N.Y. 1964).

The only method by which a taxpayer may stay collection of the tax due on a termination assessment is by filing "a bond in an amount equal to the amount as to which the stay is desired." 26 U.S.C. § 6863; *see United States v. O'Connor*, 291 F.2d 520, 525 (2d Cir. 1961); *Clinton*, 232

F. Supp. at 958. Unless the taxpayer files the bond, the IRS may seek to collect the assessed amount by bringing a proceeding in a district court, even during pendency of a Tax Court action. *See Clinton*, 232 F. Supp. at 958. In this case, Romano failed to file a bond. Thus, since the statute expressly permits the government to bring this action, and the District Court has jurisdiction to hear such cases, the only issue remaining is whether the District Court should have exercised jurisdiction under these circumstances or deferred to the Tax Court proceeding. *O'Connor*, 291 F.2d at 528. We find no abuse of discretion in the exercise of jurisdiction by the District Court.

In his conclusory opposition to summary judgment, Romano did not ask the District Court to stay the concurrent Tax Court proceeding. Furthermore, Romano offered no opposition to the termination assessment on the merits in response to the motion. Without a reason from Romano to stay its hand, and in the absence of a showing of any triable issue of fact regarding the termination assessment itself, the District Court did not abuse its discretion in granting summary judgment based on the government's submission.

Finally, Romano in his brief makes the following contention: "Suppression is mandated by the Fifth Amendment Due Process Constitution violation and the suppression remedy is contained within the guarantee of the Fifth Amendment itself." This sentence constitutes the sum total of Romano's argument on this point. Federal Rule of Appellate Procedure 28(a)(5) states that an appellant's brief shall contain an argument setting forth the "contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." Failure to develop an argument with some support in fact and law

results in waiver of the argument. *See, e.g., United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.), *cert. denied*, 494 U.S. 1082 (1990); *Hershinow v. Bonamarte*, 735 F.2d 264, 266 (7th Cir. 1984); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). As Romano does nothing more than make an unsupported allegation on this issue, the argument is waived, and we need not address it.

We have considered appellant's remaining arguments and find them to be without merit.

HON. ROGER J. MINER,
Circuit Judge,

HON. JOHN S. MARTIN, Jr.,
District Judge.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.